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No. 95-2088

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY AND COUNTY OF DENVER,
Petitioner,

v.

C. KELLEY CARPENTER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Are police officers who work under both a charter and ordinance that expressly provide that they are subject to fine and/or suspension for violation of any departmental rule, who have been regularly fined the loss of accumulated leave, who have been suspended for less than a work period for violations of rules which are not safety rules of a major significance and who have other indicia of being hourly employees eligible for the executive or administrative exemptions to the overtime requirements of the Fair Labor Standards Act?

2. Is the "window of correction" provided for by 29 C.F.R. § 541.118(a)(6) available where there are charter and ordinance provisions establishing a rule for discipline for violations of rules other than safety rules of a major significance and where there are other indicia of the employees being paid hourly?

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

There are key factual differences between this case and *Auer v. Robbins*, No. 95-897, in which this Court has granted a Petition for Certiorari on similar issues. One distinction is the existence of an express written rule found in both Denver's Charter and Revised Municipal Code subjecting all Denver police officers, regardless of rank, to fines and/or suspensions for violation of any departmental rule. Denver's use of disciplinary fines of accumulated leave days and suspensions for violations of

rules other than safety rules of major significance shows that the rule also exists as a matter of practice. Other differences include being paid, pursuant to ordinance, additional straight time for overtime hours worked and being subject to loss of pay for military leave in excess of 14 days per year.

The "window of correction" provisions of the Department of Labor regulations require, among other things, that the correction include a promise to comply in the future. Where there are express rules set forth in charter and ordinance, it is impossible to promise to comply in the future because such a promise is directly contrary to those rules. Therefore, the "window of correction" regulation is not available to Denver. Additionally, the other indicia of being hourly paid make the "window of correction" regulation irrelevant to this dispute.

ARGUMENT

I. THERE ARE SIGNIFICANT AND MATERIAL DIFFERENCES BETWEEN THIS CASE AND THE CASE CURRENTLY PENDING BEFORE THIS COURT ON SIMILAR ISSUES WHICH ARGUE AGAINST THIS PETITION FOR CERTIORARI

On June 24, 1996, one week before the Petition was filed in this matter, this Court granted a Petition for Certiorari in *Auer v. Robbins*, No. 95-897. *Auer* raises the same two issues presented by the Petitioner in this case.[1] There is a significant and material difference between the

[1] Petitioner's characterization of the first issue, which states that the employees are "otherwise exempt from the overtime requirements of the Fair Labor Standards Act," is inaccurate. As noted by the Tenth Circuit, it did not discuss Respondents' claims that the military leave and jury duty policies of the Petitioner also precluded a finding of exemption. *Carpenter v. City and County of Denver*, 82 F.3d 353, 356 (10th Cir. 1996). For at least some Respondents there are also issues of whether they meet the job duties test for obtaining exempt status. *Id.*

facts of *Auer* and this case. In *Auer*, the disciplinary rule was part of the rules and regulations of the police department. In Denver, the rule is found both in the Charter adopted by the citizens and in the Municipal Code adopted by the City Council. Section C5.73 of the Charter (Appendix 1a) provides that the rules governing the conduct of members of the police department must be in writing and must be approved by the manager of safety, a civilian official ultimately in charge of both police and fire departments. The section goes on to say, "*Any member* of the classified service shall be subject to reprimand, discharge, reduction in grade, *fine and/or suspension* for a violation of such rules and regulations." *Id.* (Emphasis added.) The Charter provision is further refined and explained in Section 42-28 of the Municipal Code (Appendix 2a) which provides that the manager of safety has the power to fine a police officer for "any misconduct" or "violation of rules and regulations of the police department" and additionally to collect the fine or "cause it to be withheld from any amount that is or may become due such person." *Id.*

In *Auer*, the single disciplinary suspension was not done pursuant to the City's rule. 65 F.3d 702, 711 (8th Cir. 1995). In this case, Denver has suspended two lieutenants and has regularly fined Respondents with the loss of accumulated leave days. 82 F.3d 358.[2] These disciplinary penalties have been imposed pursuant to the express rules quoted above. For this reason alone, resolving the issue of whether an *unimplemented* rule subjecting employees to discipline causes the loss of salaried status will not impact this case.

There is also no split in the circuits over whether salaried status is lost where there is an express and implemented disciplinary rule. In circuits which have held

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[2] Such fines are "penalties" as that term is used in 29 C.F.R. 541.118(a) (5).

employees to be salaried there was either no rule, *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Barner v. City of Novato*, 17 F.3d 1256, 1262 (9th Cir. 1994); *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993), or an unimplemented one. *Atlanta Professional Firefighters Local 134 v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991). Subsequently, in *Avery v. City of Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994) the Eleventh Circuit held that if an express rule has actually been applied to a member of a rank claimed to be exempt, then not only that member but all members of that rank are ineligible for exempt status. Conversely, whenever there has been both an express rule and its implementation, salaried status is lost. *Klein v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 990 F.2d 279, 284-87 (7th Cir. 1993); *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994).[3]

Although not relied upon by the Tenth Circuit, there are other indicia that Respondents are hourly paid in this case. Section 42-63(d) of the Denver Municipal Code (Appendix 2a) provides that Respondents are entitled to overtime compensation in either compensatory time or cash for hours worked in excess of eight in one day at straight time. Denver also has an express rule that stops paying any police officer, regardless of rank, after 14 days of military leave in one year. Both of these facts show how Respondents are not salaried employees. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) (overtime pay); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d

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[3] There are circuits that hold the existence of an express rule alone is enough to lose salaried status. *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996).

611 (2nd Cir. 1991);[4] and 29 C.F.R. § 541.118(a)(4) (temporary military leave). (Appendix 3a).

II. THE WINDOW OF CORRECTION CONCEPT ALLOWED UNDER 29 C.F.R. § 541.118(a)(6) DOES NOT APPLY IN THE FACE OF AN EXPRESS RULE OF DISCIPLINE OR DOCKING

Only two circuits have expressly commented on the application of the "window of correction" regulation where an express rule concerning discipline or docking exists; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2nd Cir. 1991); *Auer, supra*, 65 F.3d at 711, and both have held that the regulation cannot be applied. Such holdings are clearly correct given the language of the regulation. An employer may take advantage of the "window of correction" only if it "reimburses the employee for such deductions *and promises to comply in the future.*" 29 C.F.R. § 541.118(a)(6). (Emphasis added). An employer cannot promise to ignore its own express rules, particularly where those rules are set forth in a charter adopted by the people and/or an ordinance adopted by the legislative body. Even if the regulation could apply in the face of an express policy, the other indicia of hourly pay in this case makes such a conclusion irrelevant.

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[4] There are two cases holding that receipt of overtime is insufficient to cause the loss of salaried status, *Aaron v. City of Wichita*, 54 F.3d 352 (10th Cir. 1995); *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C. Cir. 1994). In neither of these cases, however, was there also an express rule concerning discipline.

CONCLUSION

The existence of express and implemented rules in both charter and ordinance relating to discipline makes the Tenth Circuit's decision correct and consistent with all circuit court decisions that have faced this precise issue. This Court's decision in *Auer* should not question the propriety of the result in this case. There is no split of authority in the circuits over whether the window of correction can apply where there is an express disciplinary rule applicable to the employees in question. Additionally, the "window of correction" regulation is irrelevant in this case. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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Denver City Charter

C5.73 Departmental disciplinary procedure. The rules governing the conduct of members of the classified service in the Fire and Police Departments shall be set forth as written rules and regulations by the chief of each of the respective departments with the approval of the Manager of Safety, provided, however, that such rules and regulations shall not contain any political or religious qualifications or disqualifications. Any member of the classified service shall be subject to reprimand, discharge, reduction in grade, fine and/or suspension for a violation of such rules and regulations.

Denver Revised Municipal Code

Sec. 42-28. Power to Fine Officers.

The manager of safety shall have the power to fine any police officer, member or employee for any misconduct or breach of discipline or violation of the rules and regulations of the police department and to collect the same or cause it to be withheld from any amount that is or may become due such person.

Sec. 42-63. Overtime pay; days off.

(d) In addition to the annual salaries as fixed by ordinance and longevity pay for members in the classified service of the police department of the rank of lieutenants of police, superintendent of radio engineers, division chief or captains of police, as fixed by Charter provisions, who are also determined to be exempt from the Fair Labor Standards Act, hours of active duty assigned to and performed by such member of the classified service of the police department in excess of eight (8) hours in any day (from midnight to the next midnight) or ten (10) hours in any day (from midnight to the next midnight) if the officer is normally scheduled to work ten-hour shifts, as certified by the member's immediate superior officer, shall be compensated by allowance of equal time off within three (3) months after performance of such extra hours of active duty or, if approved by the chief of police, by payment of salary within the three (3) months, for extra hours of active duty, such regular hourly rate of pay to be computed by dividing by two thousand (2,000) the annual rate of salary of such member, including longevity pay, at the time of the performance of such extra duty. Payments for extra hours of duty shall not be considered or included in determining or computing the pension or retirement benefits of members of the police department retired or retiring before, on, or after October 1, 1985.

29 C.F.R. Sec. 541.118 Salary basis.

(a)(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against salary due for that particular week without loss of the exemption.